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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
W.R. Grace & Co., et al.,	.	
Debtor(s).	.	Bankruptcy #01-01139 (JKF)

Wilmington, DE
July 22, 2002
9:56 a.m.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor:

David W. Carickhoff, Jr., Esq.
Pachulski, Stang, Ziehl,
Young & Jones
919 North Market Street
Wilmington, DE 19801

James W. Knapp, Esq.
Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601

David Bernick, Esq.
Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601

Janet S. Baer, Esq.
Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601

	James J. Restivo, Jr., Esq. Reed Smith 435 Sixth Ave. Pittsburgh, PA 15219
	Paul J. Norris, Esq. W.R. Grace In-House Counsel
	David B. Siegel, Esq. W.R. Grace In-House Counsel
	Brian McGowan, Esq. W.R. Grace In-House Counsel
For Unsecured Creditor's: Committee	Kenneth Pasquale, Esq. Stroock, Stroock & Lavan, LLP 180 Maiden Lane New York, NY 10038
For Zonolite Plaintiffs:	William Sullivan, Esq. Elzufon, Austin, Reardon, Tarlov & Mondell, PA Ste. 1700 300 Delaware Ave. Wilmington, DE 19801
For Equity Security Holders: Committee	James C. McCarroll, Esq. Kramer, Levin, Naftalis & Frankel, LLP 919 Third Ave. New York, NY 10022
For PD Committee:	Rick Miller, Esq. Ferry, Joseph & Pearce, PA 824 Market Street Wilmington, DE 19899
For Asbestos PI Committee:	Matthew Zaleski, III, Esq. Campbell & Levine, LLC 1201 North Market St.-Ste. 1501 Wilmington, DE 19801
For	Joseph Grey, ESq. Stevens & Lee 300 Delaware Ave.-Ste. 800 Wilmington, DE 19801

For Wesconn:	William W. Erhart, Esq. William W. Erhart, PA 300 Delaware Ave.-Ste. 1130 Wilmington, DE 19899
For ZAI Claimants:	Elizabeth J. Cabraser, Esq. Lieff, Cabraser, Heimann & Bernstein, LLP Embarcadero Center West 275 Battery St.-Ste. 3000 San Francisco, CA 94111
	Thomas M. Sobol, Esq. Hagens, Berman, LLP 225 Franklin Street-26th Fl. Boston, MA 02110
	Edward J. Westbrook, Esq. Richardson, Patrick, Westbrook & Brickman, LLC 174 E. Bay Street Charleston, SC 29401
	Allan McGarvey, Esq. McGarvey, Heberly Kalispell, Montana
For EAIC:	Scott Talmadge, Esq. Clifford, Chance, Rogers & Wells 200 Park Ave. New York, NY 10166
Audio Operator:	Virginia L. Akin
Transcribing Firm:	Writer's Cramp, Inc. 6 Norton Rd. Monmouth Jct., NJ 08852 732-329-0191

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THE COURT: There is an agenda this morning. I understand that Items 1,2 and 3 have been continued until next month's calendar and earlier this morning I signed the Order that's attached to the Certificate of Counsel on Agenda Item #5, which is the Debtor's Motion to Assume and Assign a Prime Lease. And I believe that's all. Everything else, I think, is still on the calendar.

MR. BERNICK: That's right. David Bernick for Grace. With respect to uncontested matters, what is reflected as #4 uncontested, is now contested, so maybe we can pick that up when we begin with the contested matters. Item #6, which was our Estimated Litigation Budget for the ZAI Science Trial, there has been no objection and I have an Order. I circulated copies to counsel here, and here's an Order for the Court to approve that budget for Item 6.

THE COURT: All right. This is just the Debtors' budget, or --

MR. BERNICK: Just the --

THE COURT: -- or everybody's?

MR. BERNICK: -- Debtors'.

THE COURT: Okay. I have -- I think I want to talk about that before I --

MR. BERNICK: Okay.

THE COURT: -- approve that budget. Okay.

MR. BERNICK: I guess that would bring us back, then,

to Item 4 as being the first contested matter. This relates to the Revised Compensation Program, and as Your Honor can see from the papers, only one constituency has objected to this package, that's the PD Committee, and it's our position that the objection that's been made is facially defective and for the following reasons.

The Debtor in this case followed a textbook business judgment process in the course of coming up with this Revised Compensation Package. Grace retained an outside consultant from Deloitte, Touche who's got specific expertise with regard to dealing with mass tort Chapter 11 debtors. That individual, Mr. Bubnovich, developed a series of recommendations about what the Revised Compensation Package should be. It came on for them -- the development by the Compensation Committee of Grace's Board of Directors, and that Committee is comprised wholly of outside directors. There's no inside director and there's no individual who would be affected by this compensation package. So it's a totally disinterested group of people. The Compensation Committee put together the revisions based upon the recommendations of Mr. Bubnovich, and I believe that the -- ultimately it was approved by the full board, but in any event, the Compensation Committee's say so with regard to such matters is dispositive in this area. This process was completely informed, outside consultants were involved, a completely disinterested decision

was made.

The Company, of course, went even further and sought to obtain the concurrence of the Committees in this case. A presentation of this package was made to the Committees, including their financial advisors, on the 12th of March. The PD Committee was represented in connection with that presentation. They had a financial advisor who was present. The Company responded to questions that were posed and revised this package based upon the input of the Committees, in order to come out with the final package that's now before the Court.

Our Motion was filed, and of course the PD Committee alone has objected, and they criticize, really, all aspects of this Revised Compensation Package. What's notable, however, is the absence of support for this objection and absence of anything that would implicate the application of the Business Judgment Rule. There is no affidavit even from the PD Committee's own financial advisor taking issue with this. There's no affidavit of any expert in the field of compensation that says that these decisions were improper. And there's no fact that's been produced to this Court that would say that this process was poorly informed or -- would say that this process was affected by self-dealing. This is a classic case of the Business Judgment Rule.

The real beef, as we can see from the papers that

have been filed by the PD Committee, is that they're unhappy with the fact that Grace has now intervened in connection with the fraudulent conveyance litigation. That intervention was predicated upon an absolute right to intervene, but is in any event entirely irrelevant for matters that are now before the Court. Essentially, they are unhappy and they now seek to second-guess these decisions that were made. They essentially ask the Company to dare its own employees to leave. It says, "they haven't left yet, well let's see if they do" before the Company is able to take action to preserve a business that all constituencies have an interest in preserving.

This effort to second-guess without some demonstration that the Business Judgment Rule cannot be applied is foreclosed by the Rule. Strategic objections are not permissible under the Business Judgment Rule, and we don't believe that the Court should even reach the issues that they pose on the merits because they have not been able to demonstrate that the Business Judgment Rule should not apply. I am prepared to take up any and all questions that the Court has with regard to particular features of the package, but we don't believe this objection rises to that level.

THE COURT: All right. Who wants -- for the Property Committee, who wants to speak?

MR. SACKOLOW: Good morning, Your Honor. Jay Sackolow on behalf of the Asbestos Property Damage Committee.

Your Honor, the first point I want to make is that the Debtors did meet with our financial advisors. The financial advisors did point out issues that the Property Damage Committee had with the package. The Debtors did try to address certain of those issues, they did not address all of them, and the plan that was put forth does not address all of our issues.

I'd like to begin with just a few illuminating comments about certain parts of the program that I think you should be aware of and why the Debtors have not met the burden of sustaining why they need to implement revised compensation procedures. There's essentially four --

THE COURT: Well, how am I going to challenge the Debtors' business judgment from a Response that's not supported by any evidentiary material? I mean, that -- Mr. Bernick is quite correct. There is nothing that supports anything other than an argument that this appears to be too rich. That's what the Response says. This looks like it's too rich.

MR. SACKOLOW: Understood, Your Honor. We did not have the chance to depose their experts.

THE COURT: Well, why not? How long has it been since this process has gone on?

MR. SACKOLOW: The objection was filed on July 5th.

THE COURT: The objection was filed on July 5th. When was the Motion file?

MR. SACKOLOW: I believe at the end of June. I don't remember the exact date, Your Honor.

THE COURT: And how long was the process in place?

MR. SACKOLOW: The -- the meeting was held in March of 2002. We did not see a motion until June of 2002. Based upon the Debtors' stated confidentiality reasons, they were not -- they did not present us the presentation that they gave to our financial advisors. Our financial advisors were not able to share that with us. The Debtors did attach to their Reply that they filed to our Response, but we were not entitled to that information prior to them filing that Reply. We didn't have the opportunity to take depositions of their experts prior to the -- us filing our objection.

THE COURT: Okay. Go ahead.

MR. SACKOLOW: A couple of the interesting aspects, Your Honor. The General Retention Program. The Debtors are seeking to increase it by 50%, almost 50%, over the existing number from 4.6 million up to $6.7 million. Over the past year, only 5 of 116 employees, according to the Debtors, have left their employ. This is entirely consistent with their general attrition rates prior to the bankruptcy. It appears, without a doubt, that their current program is paying their employees a sufficient amount to make them desire to stay with the Debtors.

Also interesting with respect to the increase, it

appears from their attachment to the -- Exhibit-A to their Reply, that the lion's share of the increase of this Retention Program is going to tier 1 employees. It's a group that appears to consist of 18 employees which we believe are the top management of the Debtors.

Another component of the revised compensation procedures are the long-term incentive program that's existing that was passed on the petition date by Judge Farnin and approved in June as -- June of 2001 as a Final Order. They're seeking to revise that and they're seeking to implement a new long-term incentive program. This is a program that rewards people for reaching certain goals of earnings before interest and taxes. Under the existing program it's currently being paid 50% in cash, 50% in stock. The Debtors are seeking to retroactively go back and change the existing program to be 100% in cash and eliminate the stock component. The Debtors argue that it's a decreased stock price as a result of the bankruptcy that is causing them to have to go back and pay everybody in cash now as opposed to stock. I would wonder what their stock would be doing outside of bankruptcy, given the market that we're all in.

THE COURT: Well, I am somewhat in agreement that this program should not be retroactively changed. It was approved by Final Order before, it's not appealable, and I don't see a retroactive change, and Mr. Bernick, I think the

Debtor has to live with what the Debtor did. Now, going forward, that's a different issue. But I don't see a retroactive change.

MR. SACKOLOW: Now, on the new -- on the 2002-2004 Long-Term Incentive Plan, as the Debtors call it, the Debtors are seeking also to pay this all out in cash as opposed to stock. Importantly, what the Debtors are seeking to do is they're seeking to reduce the target earnings growth rate from 10% to 6%, a reduction of 40%. The Debtors argue that this is the proper way of doing it, because 6% is the average historical growth rate of their peers in the industry. It strikes me as odd, and strikes our Committee as odd, that the historical growth rate of its peers is what they would base it upon, as opposed to their own historical growth rate. They're now targeting their bonuses to their peers' growth rate, as opposed to their own growth rate.

The effect of this, of changing it from a stock component to a cash component, has a potential effect of upwards of 6 to $9 million per year for the current year, and according to the Debtors' own numbers, could be a difference of 12 to $20 million per year additional cashout of the Estate.

It's important to understand that because of where we are right now in the bankruptcy. We're at a point the Debtors haven't begun talking to the Asbestos Committees about a plan

of reorganization. We have all the Zonolite issues on the table. We have the fraudulent transfer issues on the table. Debtors have not done anything to move this bankruptcy beyond their litigation protocols that they keep trying to institute, but now at the same time, what they're trying ensure is that additional cash will come out of the Estate to pay to their employees, to pay their top management. Your Honor, the PD Committee submits that this cannot be permissible.

THE COURT: All right. Does anyone else wish to speak in objection first?

ALL: (No verbal response)

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: I think that the materials that have been submitted to the Court respond to the issues that were raised in connection with the General Retention Program. I would note that Mr. Sackolow talks about the fact that the recipients of a lot of this benefit would be the top executives of the company and, of course, as we've indicated to the Court, the top executives of this company, even with this package, are only in the 50 to 75th percentile of compensation in reference to their peers. This is not a company that's passing out money above and beyond what the marketplace would indicate to its top people.

With regard to the reduction in the target growth rate from 10 to 6%, it's easy for counsel to raise issues with

that, but the fact of the matter is that our expert indicated, and the data supports him, that the 10% is simply unrealistic in this environment. You don't set an incentive performance level that people have no realistic ability to meet. And that's exactly why you take a look at your competition to see what performance goals are being set within the industry, because it's in the industry that people have alternatives to go out and get other jobs. And that review showed an average of 5.8 to 5.9, which makes the 6% target totally reasonable.

At the end of the day, Mr. Sackolow comes back to what really is the essence of the -- their objection. The essence of their objection is that we oughta use this compensation, and employee compensation generally, to act as a hostage for where they believe this case should go, and that is not the purpose. The purpose is to maintain the value of the business. You don't sit there and gamble with the value of the business because you don't like the direction that the case is pursuing. And very meaningfully, it is the PD Committee and the PD Committee alone which has objected. The Bodily Injury Committee has exactly the same concerns, they have the -- they have different, but also contrary strategic objectives in this case. They are not here making any kind of objection.

MR. BAENA: Judge, may I add something? Judge, you know, using a peer group for purposes of deciding what the

appropriate level of compensation in bankruptcy is is a particularly slippery slope if you don't analyze what the peer group is and where that peer group is in its own reorganization exercises. That's why it's particularly appropriate to consider the fact that we have not moved this case any further along to reorganization on a consensual basis. And I think it's entirely appropriate for the Court to consider the fact that in this case --

THE CLERK: Judge, excuse me. We're not sure he's recording. Can we take a break? Sorry, Mr. Baena.

MR. BAENA: Only when I speak.

(Laughter)

(Pause in proceedings)

THE COURT: Are you ready?

THE CLERK: Yes, Judge.

THE COURT: Okay. We're currently back in business. Mr. Baena, you were saying that --

MR. BAENA: Yes.

THE COURT: -- this case is not moving along on a consensual basis.

MR. BAENA: It's not moving along on a consensual basis, Your Honor, and as a consequence, one absolutely fundamental showing that this Debtor needs to make to support this application can't be made. And they haven't made it. And that is what they expect their Unsecured Creditors will

receive in this case. Absent that showing, I think it would be improvident to approve the application. And Judge, let's keep in mind that they already have a plan in place. This isn't an instance where we're saying no Key Employee Retention Program at all. They have a program.

Finally, Your Honor, in defining their --

THE COURT: Doesn't the existing plan expire? I think it expires at the end of the year or something like that. So, yes, there is a plan in place until the end of the year, but not thereafter. Isn't that correct?

MR. SACKOLOW: I believe the Long-Term Incentive Program is through 2003. The existing program. It's a 2-year plan, I believe.

MR. BAENA: I don't believe anything that we're talking about expires this year, Judge.

THE COURT: Okay. Can we verify that?

MR. BERNICK: The Retention Plan expires at the end of this year, and the Long-Term Plans, as I understand them, cover a more extended period of time, but there are features that kick in each year, so that you're really kind of going with rolling 3-year periods of time.

MR. BAENA: Judge --

THE COURT: And when is the existing plan --

MR. BERNICK: Well --

THE COURT: -- over?

MR. BERNICK: -- the existing plan covers a period of time up through -- the Long-Term -- the LTIP goes from 2001 to 2003 and the proposed LTIP goes from 2002 to 2004. So we're picking up a portion of the old and going on to the new.

THE COURT: Okay.

MR. BAENA: There's no urgency, Judge. And this isn't a matter that couldn't come up later in the year anyway, when hopefully there'll be more progress and they'll be able to report to the Court what they anticipate their Unsecured Creditors are gonna receive before we increase the largesse for management.

THE COURT: Well, number one, I don't know that what the Unsecured Creditors will receive in this type of a plan is the test, Mr. Baena, because what the Unsecured Creditors are entitled to receive is whatever the worth of the Debtor is and what they'd get if the case were liquidated. So if we need an evaluation hearing on that score, okay, but I think that's part of what your fraudulent conveyance action is going to get to anyway. So that process is in place.

But I have never seen a case that ties retention programs to distributions to Unsecured Creditors in a Chapter 11.

MR. BAENA: The Court very clearly said that in the Interco case. The Court refused to, in fact, in Interco, even entertain the issue of a KER program until a plan had been

confirmed, so that the Court could know when, in fact -- what, in fact, Unsecured Creditors would be receiving.

THE COURT: Well --

MR. BAENA: And also, Judge, I ask you to take into account what they're considering to be their peer group. I don't know what numbers Mr. Bernick just told you about, but in the moving papers, they characterized their peer group as other debtors in mass tort bankruptcy cases. Well, we're not involved in all those cases, but I can tell you that in U.S. Gypsum, where there is substantial presence of traditional property damage claims and we'll -- those claims are represented by Committee, the program there is on a per-employee basis almost half of what they're proposing here on a per-employee basis. So I don't know that there's a well-defined peer group. I'm not sure where these numbers are coming from. I don't see any basis at all, given that there hasn't been attrition and given that the Debtor hasn't even here today said they can't meet their former targets for profitability, that there's any concern about management not being able to attain those targets.

And then finally, and most importantly, I reiterate, it seems to me highly inappropriate to continue to reward management while there is no expectation yet on the table for Unsecured Creditors in this case.

THE COURT: Well, again, I'm just not sure that the

issue with respect to the Unsecured Creditors gets very far because if this were a going company not in bankruptcy and liquidated, there may or may not be a distribution to Unsecured Creditors. I don't know that that's the means all and end all to whether key management should stay in place. I am sure that should something drastic happen and all of the key management leave, for whatever reason, that the likelihood that Unsecured Creditors would get anything is significantly diminished.

So I don't think anybody's challenging the fact that the business ought to be ongoing.

MR. BAENA: We are not challenging that. We are not challenging the fact that compensation ought to be consistent with what's paid in the community, but Judge, this compensation uses as its target profitability results. And so, what they're asking us to do in one fell swoop is to reduce the expectations they formerly rolled out in front of the Court about where we're going in this case, and they haven't said that it's because they're not going to achieve that level of profitability and why, but rather because others in their industry don't expect to receive -- reach that level of profitability. And I'm not even sure I'm characterizing it correctly when I say others in their industry, because they're just talking about mass tort debtors. And I don't even know how that's -- comparable to what we're talking about here.

If you look at the asbestos bankruptcies, again, U.S. Gypsum, regardless of what the target -- is in that case, the cost of keeping management is not nearly as great as it is being proposed here.

THE COURT: Well, I don't know anything about Gypsum. I don't know how big a company it is. I don't know how many key employees it has. I don't know the nature of the business.

MR. BAENA: That's my -- that's my point, Judge. And yet, you're -- you know, you're being asked to rule to approve this as if you did. There's no testimony about any of that. Where are they in their bankruptcies, these other mass tort companies? You do know about some of those cases, and you know that they're maturer in terms of approaching reorganization than this case is.

THE COURT: Well, I know this case doesn't seem to be off dead center, that's for sure.

MR. BAENA: All right. I'm not --

THE COURT: And I am --

MR. BAENA: -- sure that we've reached --

THE COURT: -- a little concerned --

MR. BAENA: -- dead center yet, Judge.

THE COURT: -- and I know that in the not too near future, the Debtor's going to be looking at another extension of exclusivity and I know if this case doesn't get moving, I'm

going to have some problems with it. But with respect to key management, I think it's a different issue.

MR. BAENA: Well, if the Court already anticipates that it's gonna have some reservations about exclusivity --

THE COURT: I always do.

MR. BAENA: -- being extended, as you ought, particularly in a case like this, why not roll this forward to that next hearing on exclusivity?

THE COURT: Well, let -- why don't we break this into components, because I'm not totally sure I understand the Property Committee's objections. Are you only objecting to the long-term aspects? Or are you also objecting to the Key Retention Program that expires in December? Because this is July. There isn't a whole lot of time left to assure existing management that with respect to their retention, not the long-term but the other aspect of this, that there will be a plan in place. So I may defer it for a month. I don't expect to defer it until exclusivity's over or until this period of time expires. I don't think that's appropriate. If I was on a board, I would certainly object to a board not taking that issue on earlier, and I'm not going to defer it that long.

MR. BAENA: Well, Judge --

MR. SACKOLOW: Your Honor --

MR. BAENA: -- why don't we then defer it for a month and we'll take the depositions that somebody suggested we

should have taken by now, and we'll be able to either come to an agreement or come back to the Court and tell you why they're using strongmen to set this motion up with.

THE COURT: I wasn't suggesting that you needed any depositions. I was only asking why if you needed them, they hadn't been done yet. I want to make that clear.

MR. BAENA: Well --

MR. BERNICK: Your Honor, this is a perfect illustration of the reason why the Business Judgment Rule exists, and particularly in the context of Chapter 11. The PD Committee here is being just plainly irresponsible. The remarks that are being made here are simply counsel's effort to develop a piece of leverage in this case. That's all it is. They could have at any point gone off and gotten an expert, they could have conducted the discovery, they could have read the case law --

THE COURT: Well, they didn't get the information until July 5th. This is only July 22nd. That's not a whole long time, Mr. Bernick.

MR. BERNICK: Their advisor had this information in March. There was a whole --

THE COURT: Well, I'm being told that they weren't permitted to share it with the Committee.

MR. BERNICK: Well -- but, their advisor knew what the basic dimensions of this situation --

THE COURT: Well that's advice, but if they're looking for legal counsel, whether -- regardless of what the advisor knows, if they can't talk to their counsel about it, the counsel can't do the discovery that's necessary.

MR. BERNICK: Well, I --

THE COURT: Because you can't -- you can't hamstring somebody in that fashion, if that's the case, if it's the case.

MR. BERNICK: Your Honor, I'm now told that they could talk to counsel, that is, the financial advisor could talk to the counsel, they just couldn't talk to the Committee itself. So this is not news to counsel, either. And this is -- this is --

MR. BAENA: Your --

MR. BERNICK: -- a situation where, again, Mr. Baena has been totally and completely transparent on this. He wants to use this as leverage in the case. He's now saying, "let's hold off making these kinds of compensation decisions so we can see what we're gonna get out of the case," and the case law plainly says that that's not so. This is --

THE COURT: Well, I don't know that that's totally the -- that that's a totally appropriate focus. I've already said that on this record, Mr. Bernick. But I don't think it hurts to wait a month and let them take some discovery if that's what's necessary to see how the Debtor is exercising

business judgment. I've already said, I'm not approving retroactive changes to the existing program that was already approved by Final Order anyway. So some change needs to be done in the package that's presented to the Court. I will not undo a Final Order of Court that previously approved that package. If the directors took stock and were comfortable in it, that's what they get. Everybody who's in the stock market suffers the increase and decreases of the vagaries of the market, and they are no different, and this is their company. If anybody ought to be comfortable having the stock option and relying on it, it ought to be the directors and key employees of the company who are largely responsible for insuring the value of that stock.

Now, I recognize this is a dire economic time and a lot of stock that has intrinsic value isn't recognized for a lot of other reasons. Nonetheless, I am not changing that program retroactively and that portion is not approved. Regardless of the Debtor's business judgment, it was subject to a Final Order, it's not appealable and I'm not approving it. So it needs to be redone anyway, and it's going to take a little bit of time, I think, to segregate out the portions of the program that were previously approved by way of Final Order from those going forward. Going forward, if it's the Debtor's business judgment that all cash is necessary, then I guess that's the Debtor's business judgment, but I do want to

know why. I want to know why these employees are no longer willing to rely on the fact that the stock that they're responsible for managing isn't going to be a part of their compensation.

MR. BERNICK: Your Honor, we -- with respect to the Court, that's what we thought we did. We submitted the affidavit of our expert from Deloitte, Touche. We cited the review that he did of other companies and the review that he did of Grace and his determination that in Chapter 11 it doesn't make much sense to promise people that they're gonna get stock as value, because of the uncertainty of the Chapter 11. These very Committees are going to take the position that the stock is completely worthless. So an employee sitting here making a decision about whether to continue to work at the Company is then promised, "well, if you reach a certain level of performance, you're gonna earn out, but half your earn-out is gonna be in stock and we don't know whether the stock is gonna continue to have value or not." What we're dealing with is the reality of what people keep -- what will keep people working for this Company, and that is precisely the area that's encompassed by the Business Judgment Rule.

THE COURT: Well, that's true. But we do have the fact that the Debtor has not seen massive turnovers. Now, they -- obviously, key employees were comfortable with the plan that was in place for the period of time for which it's

in place, because they haven't been leaving in droves and there are lots of mass tort cases. I'm sure it's a competitive market. I'm sure if folks chose to leave, there is a likely place for them to go. They haven't been leaving in droves. I don't want to see them leave in droves. I don't think the Committee wants to see them leave in droves. But the question is to balance what's an appropriate incentive to keep them, and I'm not retroactively approving -- disapproving something that's already been approved by way of Final Order. So it needs to be redone.

MR. BERNICK: Your Honor, I'd ask if we could have this expedited. I mean, this is all set out, the --

THE COURT: I'll continue it till August, yes. That way if the Committee wants some additional information, they've got that time to take it. I will hear it on a final basis in August. I will not continue it again.

MR. BERNICK: Okay. Then for the Court's information, the peers with respect to which these determinations were made were not simply Chapter 11 peers. They're companies like Dow Chemical, DuPont, Eastman Chemical. This is a very professional review job that was done and there was no effort here to pass out money undeservedly. These are -- this is an effort to maintain a business that's been performing extremely well, and that everybody in this room should have an interest, a very active interest, in

maintaining. And the idea that we're gonna sit here and have self-serving statements made about where this case is going, there is no one who wants this case to be resolved on a consensual basis more than the Company. The Company has been actively pursuing discussions where they can take place with different constituencies, including constituencies that have spoken to this issue this morning, and will continue to do that. The fact of the matter is that there are a number of issues in this case, there always have been a number of issues in this case, and we're trying to move those, too, through the resolution process. So this is a two-way street. We'd like to reach closure, too.

THE COURT: Okay, that's fine. This -- agenda Item #4 is continued to August -- the August omnibus date. If the Committee needs any type of discovery, make sure you get it, because whatever the filing dates are with respect to the motions that are put on that agenda for August will apply. So if you have any supplemental materials, make sure they're filed on time and I get them in advance, that 2 weeks in advance timeframe. Do you need some specific Order?

MR. BERNICK: I don't think so.

MR. BAENA: Could -- respectfully, Judge, could we -- you know, we've had scheduling difficulties before and -- we always have scheduling difficulties with discovery -- can we compress that 2-week period a little bit, just to give us a

little bit more time?

THE COURT: The problem, Mr. Baena, is I don't get the documents. And it is very difficult to get these things piecemeal and try to fit them in, and I really need those documents in advance, especially if you're going to have some objection that's going to require some analysis and legal research and thought. I will compress it by a couple of days, so that the Debtor has an opportunity to respond to it, but I can't do much more than that.

MR. BAENA: I understand, but even if it were 10 days, it would be better than 14.

THE COURT: All right. The Property Damage Committee may submit, I guess its supplement to its objection by -- if I give them until August the 15th, Mr. Bernick, the hearing's August 26th. Does that give the Debtor sufficient time to get something to me by at least the 22nd?

MR. BERNICK: Well --

THE COURT: If you choose to submit anything more?

MR. BERNICK: Yeah. I'm sure that if they're gonna make a submission, we're gonna want to respond to it. I guess I would ask that if we have a period of time during which to get this whole thing done, that we just divide it 50/50, that if the submission's gotta be made by the twenty --

THE COURT: Theirs would be by the 16th of August, yours by the 22nd.

MR. BERNICK: Why don't we take the distance between now and the 22nd and divide it evenly? I think that that would be more appropriate.

THE COURT: Well, the problem is that they need to take some discovery. They're going to need a little bit of time to do that and that pretty much gives them 2 weeks to do discovery and a week to get their documents together. Mr. Baena, I'll cut your date back till the 15th of August. That pretty much splits the difference after the -- a couple of weeks for discovery, and keep the Debtors at August 22nd.

MR. BAENA: Thank you, Judge.

THE COURT: Mr. Bernick, I know I generally do not want copies of things sent to Pittsburgh, because then I end up with --

MR. BERNICK: Right.

THE COURT: -- triplicates and I get confused. In this case, though, for your response, I would like a copy sent --

MR. BERNICK: Sure.

THE COURT: -- to me in Pittsburgh. I don't need yours that way, Mr. Baena. There's plenty of time for me to get it. But I will need Mr. Bernick's.

MR. BAENA: Thank you, Judge.

MR. BERNICK: The next item is Item 7, which is the Motion of Wesconn for Relief from Stay.

MR. ERHART: May it please the Court, William Erhart for movant Wesconn. Your Honor, set forth in my Motion, Wesconn's a small Connecticut company with grosses of about $2 million per year, who had been a long-term customer of W.R. Grace. Wesconn sprays fireproofing material on structural steel in new constructions and renovations.

During the, basically, the summer/fall of 2000, inferior product had been sold to my client that then cost them a great deal of time and work. Consultations with W.R. Grace revealed that at the Grace manufacturing facility, they had changed the manufacturing process. Originally, the mixing device, a hopper, operated on a base isolated and spilt retardant and other chemicals into the mixture. They changed their assembly line so that multiple hoppers were operating on the same base, vibrating, and they affected one another. As a result, the chemical mixture sometimes had too much retardant, sometimes too little retardant, and clogged up the spraying devices of my client numerous times and cost them about $400,000 in various damages.

My client is currently struggling to survive. It employs approximately 20 people. It's had to max-out on its credit line, which is $150,000 for them. Invoices and bills are coming due that were related to the overtime my client had to spend correcting the problems. As a result, as the Court well knows, there's a linkage between the amount of time men

work and earn, and unemployment insurance -- Workers' Compensation, insurance liability coverage, and retirement contributions to the union, which -- to which most of Wesconn's men belong, so they're in a desperate situation, Your Honor.

This matter went into bankruptcy April 2001, and as the Court noted earlier, it's not off dead center yet. My client's waited quite a bit and now is at a point where it needs to move.

Your Honor, we're requesting relief from stay and asking the Court essentially to balance the hardship between Wesconn and W.R. Grace, and there's no doubt that there's some hardship to the Debtor in permitting this litigation to proceed. It is gonna cost them some money to defend. On the other hand, Your Honor, once litigation's been initiated, my client will at least have the opportunity to identify other responsible parties. More likely than not that there's a consultant, design engineer, a contractor, and even sub-contractors, who may have been responsible for the change in the assembly line that resulted in the inferior product.

Therefore, Your Honor, we believe, in weighing the equities, that my client should be entitled to some relief from stay to be able to go forward with the litigation and at least identify other potential defendants who may well have additional insurance to be able to resolve the matter.

Two issues that the Debtor raised in its Response, one, that my client failed to show substantial likelihood of success on the merits. We believe we have, Your Honor. I named in my Motion three Grace employees who gave my client the information that there had been a defect in the manufacturing process at the Grace facility. For purposes of the lift stay Motion at this stage, that's a sufficient showing of likelihood of success on the merits. When we filed our Motion, based on information and belief, we believed there had been insurance coverage. Some representatives at Grace had told my client that there was insurance coverage from dollar one. Since I filed my Motion, Grace has provided some insurance documents to him that are a little confusing. There are two deductible sections. One indicates that there's no deductible for this type of claim; the other one indicates that there is a 250,000 deductible, or probably more properly, a self-retention. They've also asserted in their Response that the self-retention, or the deductible, is guaranteed by a letter of credit. In other words, the insurance company upon notice is responsible for the defense of the litigation without calling upon Grace to actually pay the 250,000 deductible, but at some part in the process may call upon Grace to make good that self-retention or else it can call upon the letter of credit.

This is a relatively small construction claim, as I

mentioned, with a value of about $400,000. In a light that's most favorable to my client, the cost of litigating it, at least initially, anyway, is de minimis, a small part of that. Probably this case could be litigated from beginning to end for less than $100,000. And while it is some burden on the Debtor, that needs to be balanced against the hardship to my client as well.

THE COURT: Mr. Bernick?

MR. BERNICK: Your Honor, we've been through this one, I think, before, very recently in connection with the Kellogg case. We have a claim that's covered by insurance but with a substantial deductible of $250,000 secured by a letter of credit, which in turn is collateralized with cash. So in order to get access to that policy, we could be called upon to pay that $250,000 in cash, so there really is a cost to the Estate. Beyond that, the -- Your Honor has consistently determined that the stay should apply to these kinds of cases, really under circumstances that are much more compelling than this one.

This is a business claim. Your Honor has stood by the stay, even in connection with significant personal injury claims, but the fact that we keep on seeing a steady stream of these petitions being made in a sense demonstrates the wisdom of what the Court already has done, because we're convinced that if the Court were to lift stay for these purposes, we'd

actually see not only these, but a significantly larger number of other claims come before the Court for exactly the same kind of treatment. That's the whole purpose for the stay is to avoid that situation. So we would ask that the Court stand by the approach that was articulated and applied in connection with the Kellogg case and let the stay hold.

THE COURT: When is the bar date for unsecured general claims?

UNIDENTIFIED SPEAKER: March 31st --

THE COURT: I'm sorry?

MR. BERNICK: March 31st.

THE COURT: Has your client filed a proof of claim yet?

MR. ERHART: No, Your Honor. We have -- well, we have one prepared, but we haven't filed it yet. We were reluctant to actually file a proof of claim until where we knew where the underlying litigation might proceed, not to prejudice ourself.

THE COURT: Well, it seems to me that the underlying litigation ought to pursue by way of some objection to claim if there is one, and that what I should do is tell the Debtor simply -- well, tell you to file your proof of claim and give the Debtor a bar date by which to file an objection to it if that's appropriate.

I know that the Debtor will be doing omnibus

objections at some point, but maybe under these circumstances it would be a good idea for the Debtor to take a look at this one separately. It doesn't appear that this particular claim is going to be different from others. The only thing is, even then, what you're going to do is probably reduce the claim from a judgment somewhere, somehow, and in terms of collection, you're still looking at a plan.

So, I don't -- I think you need to file a proof of claim. I think if the Debtor has an objection to it, it needs to be objected to. I don't know that the Debtor does have an objection, but if there is one -- but I don't think it's appropriate to lift the stay. I think the automatic stay is there for a good reason, and if I were to lift it in this case, every business claimant would come in, would have some -- I guess, meritorious reason why it should be lifted in terms of the economic differences among the parties. But on balance, I think the Debtor's interest in keeping the automatic stay in place outweighs those claims.

I don't see anything in this one that is any different from what the typical creditor faces by way of an economic loss as the result of a business transaction, so I don't see anything that distinguishes this from other claims of a similar nature. So, I'm not prepared to lift the automatic stay for those reasons. But I do think you have a remedy in filing a proof of claim. And tell me when, and I'll

then expect to do it, then I'll require the Debtor to examine it and file an objection to it, if the Debtor has an objection to it, within a certain period of time thereafter.

MR. ERHART: Okay. Your Honor, then, I would suggest I could file a proof of claim by July 30th.

THE COURT: All right. Then, Mr. Bernick, I'll wait to get an Order from the Debtor, again, to enter this, but the Debtor is to submit an Order that will deny the request for relief from stay, but state that if the Creditor files a proof of claim by July 30, then the Debtor must examine that claim and if an objection to it is going to be filed, file and serve the same by -- is 2 months enough time for this? September 30?

MR. BERNICK: Be fine.

THE COURT: By September 30. And I think that will get you maybe not quite at the same place, but within the construct of the bankruptcy, a little further along.

MR. ERHART: Okay.

THE COURT: That Order will be entered. The Debtor will run it by you and then submit to me within a week.

MR. ERHART: Thank you, Your Honor.

THE COURT: Okay. Mr. Bernick?

MR. BERNICK: The next item, Item 8, is, I guess, gonna be the first of three different items dealing with the retention of counsel and budget associated with the science

trial. This one deals with the Application of the Property Damage Committee to Retain Special Counsel. So, I expect to hear from them.

THE COURT: Okay. Mr. Baena?

MR. BAENA: May it please the Court. Judge, I'm sure you've read our paper and in a nutshell, you gave us two choices as a Committee on the Zonolite issue. Choice #1 was to represent these particular claimants in these -- in this context, or door #2 was appoint -- you know -- find counsel to do it.

We took door #2. We don't believe that as a matter of law we can represent the individual interests of claimants. And we went to the people we thought we ought go to for purposes of determining who should handle this, and that was the lawfirms that represented these and similar situated claimants before the bankruptcy commenced. They gave us a list of five lawfirms. We apprised them of their obligation to come up with a budget. They've done that. And we apprised them that it was necessary for them to pick a lead counsel among them, and they have chosen Mr. Westbrook, who will be addressing the remainder of the Motions today.

I really feel that from this point -- we're just handing off at this point, Judge. In accordance with the Court's instructions, we're happy to be the gatekeeper, but I don't think we can go much further than that.

THE COURT: Okay. Well, I don't know whether you want to address this, Mr. Baena, or whether I should address this to Mr. Westbrook. My concern is I don't see a need for five lawfirms to participate in this trial. One lawfirm, yes. Two, maybe. Five, no. So, it seems to me that it's over-budgeted just on that basis alone.

I deferred the issue of the Debtor's budget and so perhaps I should bring up this issue, too, because I kind of see these two things as hand-in-hand.

I think both of the budgets are way too rich, and I do mean both. It seems to me that to get to a legitimate trial that raises these issues, we shouldn't be looking at collectively more than 10 experts. At a certain point in time they're going to be falling all over themselves with repetitious evidence. I don't intend to hear a lot of repetitious evidence. There may be some cumulative evidence necessary, but certainly, not coming from 14 to 20 experts. 10 ought to do it. So, #1, I think in terms of litigation plan, we need to limit this to 10 experts. That in and of itself reduces the cost for experts, somewhat, from the Property Damage Committee. It may raise it a little in the Debtors' budget.

The Property Damage Committee's estimate and the Debtors' are not particularly at variance with respect to expert and other out-of-pocket costs, it's the fees that seem

to be getting very far afield. But I think part of it is because the Property Damage Committee is looking at five firms. I simply am not going to approve five firms. I do not see the need for it. These are special counsel to litigate a limited issue, and that's the purpose. At least not at the expense of the Estate. If five firms want to participate, that's up to them. But this Estate isn't going to be bear the cost for five firms. I want to make that clear. Anybody who wants to participate can, but not at the cost of this Estate.

It seems to me that a reasonable litigation budget collectively, for both the Property Damage and the Debtor, is $4 million, and I think 3 million of that would be your -- allocated to fees, and a million would be allocated to expert witnesses for whatever, and costs, and that ought to be quite sufficient for the 6 months that this is -- information is going to be generated by the parties outside this Court.

So, that's what I'm looking at in terms of a budget. In fact, I think maybe that's rich, but given the fact that the Property Damage Committee's looking at 4.2-plus million, and the Debtor at 2.8-plus million, I think cutting it to 4 million overall probably makes sense. If it's absolutely necessary to go beyond that, then I'm sure both sides will be in here -- be arguing about it, because I expect that this budget is going to be divided equally. 50-50. And once your $2 million is over, then that's it. You're in as counsel and

you're done. You get no more fees unless I approve them, and I want to see some specific reasons as to why.

Now, having said that, that's what I think looks reasonable given the information that I have on hand. I'll hear everybody and give you a chance to talk me out of it. Sometimes you're successful, sometimes you're not, but you want to take a stab, Mr. Baena, I'll listen to you, if you want to push this off to Mr. Westbrook, I'll from him.

MR. BAENA: I aspire to be like Ed McMahon in this matter.

(Laughter)

MR. BAENA: And introduce Johnny.

MR. WESTBROOK: Good morning, Your Honor.

THE COURT: Good morning.

MR. WESTBROOK: That's called a punch, Your Honor.

THE COURT: I think it was. Yes.

MR. WESTBROOK: Your Honor, I have read your transcripts, and I certainly understand where the Court is coming from, and if I can make a few preliminary observations, perhaps, on the issue of a least the division, I understand why the Court has set its original benchmark.

As I reviewed these matters, and this is my first time being here before Your Honor, it appears to me that Grace has had three advantages in this matter. Since April 2001, it has been working to prepare the Zonolite issue. Grace

selected Reed, Smith, fine lawyers who I've known for over a decade, and I've reviewed their time submissions, and I see that they have spent over a million dollars already, sort of in the can, which is not in Mr. Bernick's proposed budget. His budget is going forward, we understand that.

THE COURT: But Mr. Westbrook, these issues arose because of class action suits that were filed in various Courts before the bankruptcy and requests to file some since the bankruptcy. One plaintiff already has a judgment based on this in the outside world, outside of bankruptcy. It is very hard-pressed, I think, to say that the plaintiffs in the outside world are not also prepared to address this and haven't already incurred some cost and looked at the issues from an expert witness point of view. Because if they haven't, then I think Rule 9011 is going to require some additional sanctions.

MR. WESTBROOK: Your Honor, I think that correctly so, up to the time of bankruptcy, the Zonolite claimants were getting up to speed on this issue. But as the Court has noted, this is what I think DeSeisa referred to as an immature tort. That's why the Court wants to have the science trial, to find out a little more about it and certainly reasonably so.

But the history of immature torts, Your Honor, is that the plaintiffs are always at a disadvantage, because the

defendants have been working on it, they have created the facts, they know the facts. Just let me give you an example. Mr. Bernick's budget assumes, and rightly so, that he'd be able to pick up the phone and call Grace people and ask them, "Well, what happened at Libby?" "What happened here?" "What happened there?" He can pick their brains with a phone call. We'll have to take depositions and we'll have to pull teeth. The difference in cost and effort is enormous, Your Honor. Their budget has sort of "off-the-clock" work for all the Grace people who will support them, and that's their client, they certainly can do that. We have that disadvantage. They've also --

THE COURT: But you have the plaintiffs who allege the injuries, who know where their -- where the Zonolite was put in and what happened to it. And you can pick up the phone and call them. You've got exactly the same litigation advantages on the other side. That's why we have a two-party litigation system.

MR. WESTBROOK: Your Honor's absolutely correct. We certainly can confer with our clients. But with this issue directed more to the science than to the lay issues, Your Honor, we feel that Grace, which has been doing its testing, doing testing when it made the product, et cetera, has the advantage in what they can pick up the phone. But Your Honor is certainly correct that both sides can call their client.

Grace has also had the advantage of people. The Grace submissions indicate that Reed, Smith has had up to 14 lawyers working on this matter in various months since April. And Your Honor, although there've been people discussing these issues on our side, I don't think that anyone could fairly say that we have had the opportunity or have had 14 lawyers from one firm -- any firm -- working on this.

THE COURT: Then you should be grateful, because that will mean that their discovery documents will be in better shape to be able to produce to you expeditiously and they won't incur any portion of their budget by putting them together, because they're already together.

MR. WESTBROOK: Yes.

THE COURT: So you get the advantages just as they did.

MR. WESTBROOK: Well, we're certainly happy to have whatever advantage we can get from Grace, Your Honor. For instance, perhaps they have computerized their documents and they have them on a computerized index. I assume that would be available to us and they wouldn't invoke a work product privilege, then. And we'd be able to get that.

THE COURT: If they're computerized and you can make use of the computers as long as they're restricted to this particular trial on the science issues, I don't see why they can't produce -- be produced in that format.

MR. WESTBROOK: Yes, Your Honor, I think that would certainly help on these --

THE COURT: But I don't know whether they are in that format.

MR. WESTBROOK: I'm just -- from past experience in non-Zonolite cases, Grace has done internal work to computerize its documents --

THE COURT: Fine, if --

MR. WESTBROOK: -- and get them on.

THE COURT: -- that's the case, everybody will benefit from that.

MR. WESTBROOK: There are additional documents, Your Honor, that were produced in connection with this in some EPA proceedings and I -- last I lost track of them they were out in Denver, and I assume those documents have been reviewed by -- by Grace and those documents have been organized and we'll have some access to that to make it more efficient.

THE COURT: I don't know. This isn't a discovery colloquy. As far as I know, you haven't even propounded any yet, because you're not retained as counsel. So --

MR. WESTBROOK: Correct, Your Honor.

THE COURT: -- why don't we wait and see if there are disputes, because if there are, I'm sure that Judge Dreier will be happy to hear from you about the discovery disputes, because gentlemen, that's where you're going to be taking

them. So, what's next?

MR. WESTBROOK: Yes, Your Honor. My point is that that work is in the can from Grace, and I think fairly said, the people on Grace's side certainly know more about their documents, what they've done, the science. I believe Grace has also already retained experts and those experts have already done or may have already done experimental work and done work that's not in their budget, work that we've got to start behind. We're -- basically, Your Honor, we're 14 months behind. They're 14 months out ahead.

THE COURT: You shouldn't be. The suits were filed in the State Court already. You shouldn't be 14 months behind. I can't help that fact. What I can do is order that the Debtor produce whatever it is that the Debtor has that's going to be relevant after you file a reasonable request for same. And to that extent, you'll benefit from that preliminary work.

MR. WESTBROOK: Your Honor, we certainly were running with them up until April 2001, but after that, they could continue to work on their documents in their repository. Our discovery stopped, our work stopped, they got permission from the Court to hire experts, and logically, we were not hiring experts to do work on claims that we didn't know where they were going yet. As the Court said, we're sort of at square one right one. So my point, Your Honor --

THE COURT: But they produce the product. If they don't know more about this product than the plaintiffs do, there's something wrong in the world. I mean, that's the way it always is.

MR. WESTBROOK: I think -- that's certainly correct. They do know more about it, and that's what we need to try to --

THE COURT: Fine.

MR. WESTBROOK: -- find out.

THE COURT: So go take your discovery and find out.

MR. WESTBROOK: Right. What I suggest, Your Honor, is that to divide the budget equally, whatever the budget is, to divide it equally gives Grace an unfair advantage because they've had the time --

THE COURT: The Debtors' paying for this, which in no other context would the Debtor ever be required to do that I know of. As a result, I think that this is a quite reasonable prospectus that the Court is imposing and I -- whatever the budget is, it's going to be divided equally. If I -- if it turns out that that's an incorrect view, from the information I have available, I'm sure I'll be hearing from you. But as of this minute, it's a division equally.

MR. WESTBROOK: Yes, Your Honor. I understand your Court's view. Now with respect, Your Honor, to the lawyers who are gonna prosecute the case, the Zonolite effort has been

a collaborative effort of a number of firms, and the Court is rightly concerned about the budget and I've seen in prior transcripts the Court said "whatever the budget is, that's gonna be it," and the Court wasn't particularly concerned whether you spent it on experts or whether you spent it on lawyers, et cetera.

I would suggest that just as the Court has given the Grace side discretion to hire -- they have Kirkland & Ellis, fine lawyers, and to bring on Reed, Smith, and to let them have 14 lawyers work a month, et cetera, that the Court should not be particularly concerned if, for instance, if I'm lead counsel and we've got a document production in Boston, rather than fly people up from South Carolina, I could call on Mr. Sobel, who's in Boston to go over there and do that. Or if I have documents out in Denver, I could call on Mr. Scottus in Spokane to be able to go out and do that. Or we have an expert witness in San Diego that Mr. Brazier's firm could go out there from California. I think, Your Honor, it could bring significant efficiency to the process for the Court to be concerned, as it rightly is, about the budget, but to leave some discretion in lead counsel to call on lawyers from other firms, as opposed to getting 10 lawyers from my firm to work on it. That should not necessarily be the be-all and end-all. It's the best lawyers, the most experienced lawyers, the most efficient lawyers, now, with the budget that the Court

suggested.

THE COURT: That's fine, with one caveat. I am not going to approve any interconference telephone calls between lawfirms. Because as soon as you start that, that takes the efficiency out of it. So my view is, if you want five firms involved, that's fine. But, the interconference calls at which you get up to speed is on your dime, not the Estate's. Otherwise, I'll approve two and your interconference calls between the two firms, as they will for the Debtor, they'll be approved, up to the maximum budget that I'm submitting.

MR. WESTBROOK: Okay. I understand that, Your Honor. I understand that.

THE COURT: But I want to know who's being retained and for what purposes. I do want to know that piece, but I'll let you work that out.

MR. WESTBROOK: Okay. Your Honor, with that, unless the Court has some questions, I think I understand the Court's views on the overall budget. We respectfully believe it is a bit slim, I think. For one -- one time Grace and we -- agree on something, so maybe that means we're both wrong, but I think it is a bit slim, because I know the Court knows this is an important issue, and wants to have a full and fair presentation and something that somebody won't come back later and say, well, this was done on a less than full -- both sides said it should cost more, the Court said less, so it couldn't

have been due process. We try to avoid that.

THE COURT: Now, wait a minute. I have never heard that a budget is a due process issue. And I've already said that if you think I've way underestimated this, I'll be hearing from you. It seems to me that $4 million for 4 firms and some expert witnesses and document productions over a 6-week period is gonna be hard-pressed by anybody to say that that's not a reasonable budget. That's a lot of money. By anybody's stretch. A lot of money to get one trial under way, especially with 10 experts. However, if I'm incorrect, I will be hearing from you and I expect to. I'm not trying to hamstring either side to the point where you can't produce your witnesses or get your evidence in. But I want a reasonable budget. I think this is erring on the side of being too generous, not less generous. But because of your estimates, I will go up to $4 million, 3 for fees, 1 for a combination of costs and experts.

MR. WESTBROOK: We understand, Your Honor, and if the costs and experts don't come up to the million dollars, do the sides have discretion on the fee side, or would we need to come back to the Court on that?

THE COURT: You'll have to come back. I'm going to look at your fee petitions anyway. But I'm putting you on a budget. I want to see how this is going. The problem is the maximum amount I intend to approve right now is $4 million.

And quite frankly, if your fees and your expert -- witness fees and costs don't go up to a million dollars and you need additional legal time, probably both sides will be in that position. So, I'm happy the Debtor knows that it's going to commit $4 million to this project right now. If you all can collectively, both sides, can agree that this distribution is not appropriate, you can let me know. I'm usually not in position of taking on issues that the parties agree otherwise about. Occasionally, but not often. And so if you can agree that there should be a different distribution, fine. I'm sure I'll be reasonable about it. But for now, since the sides don't seem to agree on much, this is the Order that I'm entering.

MR. WESTBROOK: Thank you, Your Honor. We'll confer with Grace on that issue.

THE COURT: All right. Mr. Bernick?

MR. BERNICK: Your Honor obviously correctly recited the backdrop for this whole discussion, which is that it is highly unusual that a Debtor would have to pay for the cost of prosecuting claims against it. And I think that that was very much behind Your Honor's pretty clear statement last time, that we should only have to pay for one lead lawfirm. I remember that discussion quite well. Against my dire prediction that the claimants would not be able to agree among themselves and we would have five -- actually, what I said

was there are three lead lawfirms in the fraudulent conveyance litigation, now it's gotten worse, there are five lead lawfirms.

And I think it's very important that -- you know -- who the folks are. I don't think anyone takes issue, I know that no one takes issue, with the qualifications of Mr. Westbrook and Mr. Terkowitz. I've litigated against Mr. Westbrook in completely unrelated matters; he's a very, very capable lawyer. Likes, I think, generally to be the lone wolf in any event. He obviously has background experience here and there's no question but that he should be lead counsel.

When you go down the rest of the list, you really cannot find any compelling reason to have them be part of it, other than the argument that's been made here this morning, which is, well, we need more help. Well, "we need more help" shouldn't take you to saying, "well, we're gonna have, for example" -- and I don't mean to pick on Elizabeth, in fact I'll pick on her in a way that is laudatory. She is a very, very experienced and highly regarded class action attorney. But what does class actions have to do with the issue that we're gonna be trying, which is the science issue?

THE COURT: At the moment, nothing. But, Mr. Bernick, I'm putting them on a budget of $1½ million, totally, for fees. As I am with the Debtor. If they want to spend it all doing something that isn't going to be fruitful for

producing witnesses at trial, then they're going to lose, because they won't have the evidence at trial. I doubt very much that that's the way that they will choose to allocate their million and a half dollars.

MR. BERNICK: Here's the problem that I see. You know, obviously if we have a hard and fast budget, you know, we gotta live with that. But as I heard Your Honor, there is a process that could unfold where people are saying, gee, it has not proven to be enough, and then the budget is broken, and then it's kind of a little too late to say, well, the wrong lawyers are involved.

THE COURT: Oh. My view is, Mr. Bernick, I'm approving, in advance, a budget of $4 million. It may not get to that level, because the fees and costs that I approve within that budget may not get to $4 million. But I want the Debtor to know that it has to have, somewhere, $4 million in cash to pay for this science trial. That's what I -- that's the point that I'm trying to make. If that budget turns out to be wholly inadequate, I'm going to hear it from the Debtor too, because the Debtor has half of it and the Committee has half of it. So if it's wholly inadequate from one side, it's going to be wholly inadequate from the other, and I don't think it should be an issue that anybody's going to be objecting to. Well, you may object to how it's inadequate, but you won't object to the fact that it's inadequate, because

I'll be hearing from both of you. And it's going to take a lot of information to convince me that this budget isn't rich enough to support this trial. I've looked at everything the parties have submitted. I think it's -- I think your estimates are, as all estimates probably ought to be, high, because you don't want to be trapped into something low, but I think they're very high. I think the Debtors' is less high than the Committee's, but the Debtor isn't expecting to use five firms. I don't think that the Committee needs five firms. If they'll -- if it will help them to minimize costs to send somebody from Boston to do a deposition in Boston, fine. I don't think the Debtor has any issue with attempting to save costs. That's the point.

So, I've already told Mr. Westbrook I want to know from him, I'm going to get an outline from him, about who is going to be doing what within this litigation structure and it could come in the fee application process, because I want to make sure that it is in fact an economy to this Estate, not costing the Estate money. I'm willing to approve two firms for both sides, one as lead counsel, and one to make sure that everything else that has to get done in a litigation of this scope gets done. That's it. They want to hire somebody else, at essentially their expense, because it's within this budget, then so be it. They'll need my approval, because they're part of a Committee.

MR. BERNICK: So just to be concrete, we're gonna go back and aim at the $2 million assigned in the way that Your Honor has indicated. They will pick two lead firms --

THE COURT: One lead firm.

MR. BERNICK: One lead firm.

THE COURT: And another firm to assist with whatever they want. I want -- Mr. Westbrook has been designated as lead counsel, that's fine. He's the lead firm.

MR. BERNICK: Okay. And they'll also be one other firm and then they will submit a new budget to the Court --

THE COURT: As will the Debtor.

MR. BERNICK: As will the Debtor. That --

THE COURT: For the Debtor's side.

MR. BERNICK: Right. That identifies the two firms and who is going to be doing what, and then states what their requests for the budget is.

THE COURT: Yes. That's essentially it. And within that, if they say that, for example, if the depositions are going to be in the New England area, that they're going to use one of the other folks on this list to do that deposition, fine. And we know in advance that that's who it's going to be.

MR. BERNICK: We'd like to get this -- it seems to be appropriate to get this resolved soon.

THE COURT: Yes.

MR. BERNICK: Can we get this done on the basis so that Your Honor can take it up next time?

THE COURT: I'd like to have it done by way of an Order without another hearing on it.

MR. BERNICK: That's fine with us.

THE COURT: I'm not sure I need another hearing. Is the Committee going to be looking at another hearing? Mr. Westbrook?

MR. ERHART: Here's Johnny.

MR. WESTBROOK: Your Honor, I'm not sure another hearing is necessary, but I did want to be clear that Mr. Bernick said, well, we'd say, "who's gonna do the Boston work?" It may not be -- always geographically divided. It may not be quite as clean and neat as that. There may be an expert in Boston who, for instance, I have to take for some reason, and I think we could certainly give the Court some guidance, but I would hate to have a --

THE COURT: I'm not approving five firms in advance, Mr. Westbrook. I've tried to make that clear. I'm --

MR. WESTBROOK: I understand.

THE COURT: -- approving two firms. You pick -- you collectively -- you pick the two. If you find it necessary for economy of scale on a piecework basis to bring somebody else in, I assume it'll be one of these other three firms, they're the only ones that have been designated on this

record, I'm saying in advance, if you tell me for what purpose, I will approve that, with the exception that I'm not approving the work that it's going to take to get another firm up to speed in this case. I'm approving the work to get up to speed for two firms, not for five. Because I think two's adequate.

MR. WESTBROOK: I understand, Your Honor, but with that, Your Honor, then we might want to have some time to confer on that and maybe the next hearing would be appropriate, then --

THE COURT: All right.

MR. WESTBROOK: -- to have that approved.

THE COURT: Sure. That's fine. In the meantime, however, I want to get this project started.

MR. BERNICK: Yeah. We've got another agenda item that deals with the schedule.

THE COURT: Yes. So, is there any reason, Mr. Westbrook, if you're being designated as lead counsel and you've now got this parameter, you know I will sign an Order that will appoint you as lead counsel, only I can't sign it until I get, so as of today, you're designated as lead counsel. The Order can be retroactive in that respect. Is there any reason now we can't get to the discovery issues and the -- the scheduling Order, I guess I should say? Mr. Zaleski?

MR. ZALESKI: Matthew Zaleski. Campbell, Levine on behalf of the Asbestos Personal Injury Committee. Your Honor's last comments suggests that now might be the time to hear our objection, which the Committee reiterated its decision to press today. And it's unlike the others. Our focus really isn't the how much, but it's who.

While the PD Committee's actual application is careful not to cite to Section 1103, I find it difficult to understand what other statutory predicate might be available for such an application. 327 certainly doesn't apply; 1103 seems, if not to apply in letter, it certainly should be applied in spirit. I think our Committee has difficulty, and if you permit me to step back, at the time we filed our objection and subsequently --

THE COURT: Which firm are you objecting to?

MR. ZALESKI: Actually, that's precisely what I was clearing up. We had understood that the Ness, Motley firm was not going to be going forward with this. I have not received subsequent confirmation. The papers are written directed at the McGarvey, Heberling firm. The facts and circumstances, however, are the same, and anything that we would have said in the paper regarding McGarvey, Heberling, if it turns out our information at that time was wrong, equally would be applicable to the Ness, Motley firm. So it would be both of those unless someone can tell me otherwise.

THE COURT: All right. And both of those attorneys sit as attorneys in fact for members of the Asbestos Creditors Committee?

MR. ZALESKI: In the case of McGarvey, Heberling, the same lawyers. In the case of Ness, Motley, there's -- the lawyer who sits as attorney in fact on the Committee is not in fact the one's who's proposed or was originally proposed here. But the objection still would be the same.

THE COURT: Well, with respect to the Ness, Motley, hasn't Judge Wolin in a similar context with respect, I think it was to Mr. Dreier, required a china wall. That should work for purposes of representation so that the information can't be shared. I am concerned about a conflict. It seems to me that there may be an actual conflict with an attorney who sits as an attorney in fact for somebody on one Committee to now try to represent the interests of another. I am concerned about that. And I think the Committee's objection is well-founded. But can it be cured by a china wall?

MR. ZALESKI: I do not believe the Committee in its last discussion of the subject thought so, but we'd be willing to try to work, I presume, at something like that, if that was this Court's direction. But beyond just that issue, and this just sort of comes up when you look at the lack of a statutory predicate, I mean, when you start talking about disinterestedness and the applicability of paying someone

under 328(c), where maybe we don't necessarily have to get to actual conflict or not, but simply that this compensation would be done and you do have -- you're being compensated as special counsel to the PD Committee or whatever euphemism gets applied to it, that would be drawing against the Estate to pursue dollars on behalf of one claimant, contrary to performing a function and a fiduciary function to another Committee on behalf of a totality of claimants who have competing claims to those same dollars.

THE COURT: I think the particular attorney who is the attorney in fact has a conflict and cannot work. The question is, can a firm work if there is a china wall?

MR. ZALESKI: I guess my question is are you instructing us to attempt to work with that or to see if the Committee is willing to. As of end of last week, that was not something that they were willing to, but if instructed by this Court to try and implement programs, we suppose we could. Our Committee is still monitoring the Zonolite litigation, believes that there are issues related to the Zonolite litigation that we may like to be heard on at some point or another either in this Court or should there be a subsequent appeal. We do believe it possible that we would be taking positions adverse to the Zonolite claimants.

THE COURT: Let me first inquire whether Ness, Motley intends to somehow or other be involved in this process, and

then I'll ask the same thing with respect to McGarvey. Mr. Westbrook, do you know the answer?

MR. WESTBROOK: Your Honor, I'm not here for Ness, Motley, but it was my understanding, I had received no notice that Ness, Motley was withdrawing its application to be involved in this in any way.

THE COURT: And what about McGarvey?

MR. WESTBROOK: Mr. McGarvey was here.

MR. MCGARVEY: I'm here, Your Honor, and if I may have an opportunity to respond to the matter.

THE COURT: Identify yourself, please, on the record.

MR. MCGARVEY: Allan McGarvey, McGarvey, Heberling, Sullivan & McGarvey. Your Honor, our firm represents Montana claimants Price and John and Marjorie Prebell. They're three of the 10 ZAI claimants that are in this science trial. Mr. Price and the Prebells have been lead Plaintiffs in the ZAI litigation from the start, through the multidistrict litigation certification and into the present, and our firm has been an active participant in the litigation throughout that time.

Our lawfirm also represents Mr. Royce Ryan, who serves on the Personal Injury Committee. He is a personal injury claimant from Libby. I believe Mr. Ryan was appointed to the Committee because the Trustee recognized that the Libby claimants are a substantial constituency of very seriously